

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PROVIDENT LIFE & ACCIDENT	:	CIVIL ACTION
INSURANCE COMPANY	:	
	:	
v.	:	
	:	
ROBERT M. NISSENBAUM and	:	
NORMA R. FRANK	:	NO.: 97-5666

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**NOVEMBER 17, 1998**

Presently before the Court is Plaintiff's motion for protective order (Document No. 19) and Defendants' response thereto. In consideration of the parties' memoranda, and having conducted an in camera review of the investigative file Plaintiff seeks to protect, the Court finds that, with two exceptions, the file is privileged, and Plaintiff's motion is granted.

In mid-1995 Plaintiff received some information that Defendants, both of whom were receiving payments under separate disability policies, actually were not disabled. Plaintiff then began an investigation into whether Defendants fraudulently filed claims under these policies. Based upon the documents the Court reviewed today, the file then was transferred to Plaintiff's investigative unit, and within a few months representatives of that unit retained outside counsel.

Defendants urge the Court to deny Plaintiff's motion on the grounds that the documents were not produced in anticipation of litigation and are necessary to enable Defendants to pursue their bad faith claim against Plaintiff. These arguments seem focused on challenging the applicability of Plaintiff's work-product claim, see Fed. R. Civ. P. 26(b)(3), but the Court will consider them expansively so they also embrace the issue of whether the attorney-client privilege applies. Further, for the purpose of clarity, the Court will categorize the documents according to

whether each was an internal memorandum or a correspondence with counsel.

The Court is persuaded that the majority of the internal memoranda and any attachments are protected under the work-product privilege. As a preliminary matter, Defendants' mere claim of bad faith is not enough to shatter the privilege. See Dombach v. Allstate Ins. Co., No. 98-1652, 1998 WL 633655, at \*1 (E.D. Pa. Aug. 27, 1998); Fidelity & Deposit Co. . McCulloch, 168 F.R.D. 516, 524 (E.D. Pa. 1996); see also Garvey v. National Grange Mut. Ins. Co., 167 F.R.D. 391, 393-95 (E.D. Pa. 1996) (recognizing that parties prosecuting bad faith claims can discover the "substantial equivalent" of privileged information through depositions). Because the work-product privilege applies, the Court will analyze Plaintiff's claim under the framework of Rule 26(b)(3), which provides protection for documents prepared in anticipation of litigation but allows for their discovery upon a showing of substantial need and undue hardship in obtaining their substantial equivalent. The internal memoranda Plaintiff seeks to protect were created in anticipation of litigation. These memoranda frequently reference prospective litigation, and, when read as a whole, demonstrate a comprehensive pre-litigation approach. Further, Defendants have failed to show either a substantial need or why the opportunity they enjoyed during the discovery period, which the Court extended three times, was inadequate to obtain the substantial equivalent of these memoranda. Only two sets of documents fall outside of this privilege. The spread-sheets detailing Plaintiff's payments to Defendants (SIU 136 F,G,H, and K) are not privileged, and neither are the two reports from Dr. Balasubramanian (SIU 154-158). All other internal memoranda are privileged, and Plaintiff's motion for a protective order with respect to these documents is granted.

The remainder of the documents Plaintiff withheld, correspondence with counsel,

similarly is protected by the attorney-client privilege. Based on its review of these documents, the Court is satisfied that each correspondence was a confidential communication privileged under Pennsylvania law, and that this privilege never was waived. See 42 Pa. Con. Stat. Ann. § 5928. Accordingly, Plaintiff's motion for a protective order with respect to these documents also is granted.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PROVIDENT LIFE & ACCIDENT	:	CIVIL ACTION
INSURANCE COMPANY	:	
	:	
v.	:	
	:	
ROBERT M. NISSENBAUM and	:	
NORMA R. FRANK	:	NO.: 97-5666

**ORDER**

AND NOW, this 17th day of November, 1998, in consideration of Plaintiff's motion for a protective order (Doc. No. 19) and Defendants' response thereto, and having reviewed in camera the documentation provided by Plaintiff, it is hereby **ORDERED**:

1. Plaintiff must produce to Defendants Documents SIU 136 F, G, H, and K and Documents SIU 154-158; and
2. Plaintiff's motion for a protective order is **GRANTED** with respect to all other documents for which Plaintiff has claimed privilege.

BY THE COURT:

---

JAMES McGIRR KELLY, J.